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No. 72-1484

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In the Supreme Court of the United States

OCTOBER TERM, 1972

MICHAEL POSNER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

PAGE

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Nature of the Case 2

Statement of Facts 3

Reason for Granting the Writ 5

Appendix—

A. Opinion of the Court of Appeals for the Seventh Circuit ..... App. 1

B. Judgment entered April 3, 1973 ..... App. 9

AUTHORITIES CITED

Cases

United States v. Umberto Jose Chavez, No. 72-2240 (9th Cir., decided February 28, 1973) 5, 6, 7, 9

United States v. Giordano, 469 F.2d 522 (4th Cir. 1972) 6

United States v. Richard Michael King, No. 72-1593 (9th Cir. decided February 28, 1973) 7

United States v. Jerome Leavitt and Norman Shabas, No. 72-1729 (7th Cir., decided April 3, 1973) 3

United States v. Jack Roberts, et al., No. 72-1514 (7th Cir., decided April 3, 1973) 2

United States v. Charles Bishop Smith, et al., No. 72-1637 (7th Cir., decided April 3, 1973) 3

Other Authorities

18 U.S.C., Section 1952 2

28 U.S.C., Section 1254(1) 2

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OCTOBER TERM, 1972

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MICHAEL POSNER,

Petitioner,

VS.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Michael Posner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit vacating the judgment of conviction and remanding to the United States District Court for the Northern District of Illinois for further proceedings in accordance with the opinion of the Circuit Court of Appeals.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is printed in the Appendix to this Petition (Appendix A).

JURISDICTION

The judgment of the Court of Appeals was entered on April 3, 1973, (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Should evidence obtained by wiretapping be suppressed where the authorization for the application is not signed by the Assistant Attorney General whose name appears thereon?

NATURE OF THE CASE

Defendant was indicted with fourteen other persons in March 1971, for conspiring to violate Title 18, United States Code, Section 1952 as that law applies to the use of interstate facilities to promote and manage a gambling enterprise. (R. 1). The case was disposed of regarding the other defendants by the entries of pleas of guilty.

On May 4, 1972, after a hearing, the trial judge denied a motion to suppress the results of court authorized wiretapping. (Tr. 20, May 4, 1972).

On May 25, with the court's consent and the government's concurrence, the defendant entered a plea of guilty to the indictment—saving only his right to appeal from the trial court's ruling on the motion to suppress (Tr. 5, May 25, 1972). On July 10, 1972, the defendant received a sentence of four years, all of which was suspended but the first six months.

On appeal, the petitioner's case was determined by the same panel that considered three other cases involving the validity of wiretap authorization orders. These cases are *United States* v. *Jack Roberts, et al,* No. 72-1514; *United*

States v. *Charles Bishop Smith, et al,* No. 72-1637; and *United States* v. *Jerome Leavitt and Norman Shabas,* No. 72-1729. The order suppressing the wiretaps in those three cases were affirmed and the government has made known its intent to file a petition for a writ of certiorari in those cases. A single decision was rendered by the court on all cases and is set forth as Appendix A.

STATEMENT OF FACTS

The first wiretap order signed by a judge in the district in which the indictment was returned was signed on May 6, 1970 (Def. Ex. 1). Orders extending the original wiretap order or resulting in new wiretaps based on information obtained from prior wiretaps were signed on May 22, 1970 (Def. Ex. 6) and June 5, 1970 (Def. Ex. 11).

Both the application (Def. Ex. 2) and the affidavit (Def. Ex. 5) upon which the trial judge relied in authorizing the first wiretap in this district contained information obtained by court-authorized wiretapping in Detroit, Michigan. (See R. 5 and Exhibit 2). These wiretap orders, naturally, preceded the wiretapping order in Chicago and were made part of the Defendant's exhibits (Def. Ex. 22, 27, 32 and 39).

In summary, there are seven court authorized wiretap orders—three in Chicago and four in Detroit—that affect the disposition of the points raised on this Petition. The following box score is offered as a way of clarifying, perhaps, the factual basis for petitioner's arguments.

Date order was signed	City of District in which order was signed	Interception authorization signed by	Authorization application sign
May 6, 1970	Chicago	Mitchell signed[1]	Shapiro[2] for
May 22, 1970	Chicago	Mitchell signed	Petersen[4] for
June 5, 1970	Chicago	Lindenbaum[5] signed for Mitchell	Shapiro for
March 16, 1970	Detroit	Mitchell signed	Petersen for
April 3, 1970	Detroit	Lindenbaum signed for Mitchell	Petersen for
April 15, 1970	Detroit	Mitchell signed	Petersen for
April 27, 1970	Detroit	Mitchell signed	Petersen for

[1] Mitchell is John N. Mitchell, the Attorney General at the time.

[2] Shapiro is Harold Shapiro, a Deputy Assistant Attorney General at the time.

[3] Wilson is Will Wilson, an Assistant Attorney General at the time.

[4] Petersen is Henry E. Petersen, a Deputy Assistant Attorney General at the time.

[5] Lindenbaum is Sol Lindenbaum, the Executive Assistant to the Attorney General at the time.

REASONS FOR GRANTING CERTIORARI

I.

WHERE WIRETAPPING EVIDENCE IS OBTAINED BASED ON AN APPLICATION WHOSE AUTHORIZATION IS NOT SIGNED BY THE ASSISTANT ATTORNEY GENERAL WHOSE SIGNATURE APPEARS THEREON, A MOTION TO SUPPRESS SUCH EVIDENCE SHOULD BE SUSTAINED.

The decision of the Seventh Circuit holding that the trial judge was correct in not suppressing the wiretap evidence, although the orders procuring it were not signed by the Assistant Attorney General, is contrary to and squarely conflicts with a recent decision by the Ninth Circuit, *United States* v. *Umberto Jose Chavez,* No. 72-2240, decided February 28, 1973.

The Seventh Circuit has characterized the role of the Assistant Attorney General in authorizing wiretap applications as a ministerial function which can be sub-delegated. The misrepresentations to the District Court that (1) Assistant Attorney General Will Wilson was the authorizing officer, and (2) Mr. Wilson had given his personal approval and attention to the application were characterized as follows by the Seventh Circuit:

> "Moreover, although the applications submitted to the trial judge identified Assistant Attorney General Will Wilson as the authorizing officer specially designated by the Attorney General, we would not be inclined to elevate form over substance to find a violation of 18 U.S.C., Section 2518(1)(a) and (4)(d), requiring the identity of the authorizing officer be transmitted

to the court if there had been an initially proper authorization." (pp. 3-4, slip opinion. See Appendix A).

We urge upon this court the reasoning and language of the Ninth Circuit in *Chavez,* which saw the same situation as follows at page 6:

> "However, there certainly was not compliance with Section 2518(1)(a) which requires that 'Each application for an order . . . shall . . . include . . . the identity of . . . the officer authorizing the application,' or with Section 2518(4)(d) which requires that the order do likewise. There was not merely an omission of the required information; there was a misrepresentation, in circumstantial and carefully phrased detail, all pointing to Wilson as the officer authorizing the application, when in fact he did no such thing."

This court granted certiorari on March 26, 1973 in *United States* v. *Giordano,* No. 72-1057 to consider the following questions:[6]

> (1) Were the procedures followed within the Department of Justice in authorizing applications for wiretap orders sufficient to comply with Title III of the 1968 Crime Control Act?
>
> (2) If the authorization procedure was not sufficient, is suppression of the wiretap evidence required in this case?

In *Giordano,* neither the Attorney General nor any Assistant Attorney General authorized the applications. Because the Attorney General did not authorize the initial application, the Fourth Circuit did not reach the question presented in this petition. However, the court did say:

> "Perhaps it can plausibly be argued that when an application is properly authorized and only the identity

[6] That case is reported below as 469 F.2d 522 (4th Cir., 1972).

> of the source is mistakenly transmitted to the judge, he would have authorized the wiretap had he known the real facts. But where in the first place there is no proper authorization, this argument is unavailable. If Judge Northrop had been aware of the real status of the application, that neither Mitchell nor Wilson even knew of it, and that the application had been approved and initialed 'JNM' by Lindenbaum, we are certain that he would have refused to permit the wiretap." (p. 530).

The plausibility of such an argument is refuted subsequently in the same opinion where its author, Senior Circuit Judge Soboloff stated:

> "To summarize: Congress enacted the various sections of Title III for a purpose. It wanted only specially designated persons of a certain statute within the Justice Department to initiate applications; it directed that the identity of the individual be transmitted to the authorizing magistrate so that he could be certain on whom he was relying; and it wanted the name of the authorizing individual stated in the judicial order so that interested parties might later be able to trace the line of responsibility. We cannot relegate provision after provision to oblivion by terming each a mere 'technicality'—or else we leave the statute a shadow of itself, an apparition without substance." (p. 530).

As has been pointed out, the Seventh Circuit affirmed suppression orders where Attorney General Mitchell did not personally initial the memoranda to the Assistant Attorney General. The Ninth Circuit reached this same conclusion regarding the necessity for Mr. Mitchell's personal attention in reversing convictions and ordering the suppression of evidence in *United States* v. *Richard Michael King,* No. 72-1593, decided February 28, 1973, the same day *Chavez,* cited *supra,* was decided.

It is not elevation of form over substance to hold high public officials to their statutory tasks and to expect that their signatures will be *bona fide* on papers submitted in support of motions in federal courts.

The evils of what occurred in the instant case as well as in a myriad of other cases are obvious.

Concerned that the grant of wiretapping power to the Justice Department was a drastic invasion into the rights of its citizens and subject to abuse for political and other reasons, Congress surrounded the right to wiretap with what it considered sufficient safeguards. Among these safeguards was the placing of the initial responsibility for selecting wiretap sites and persons in public officials who were highly visible and whose nominations had been offered to the senate for confirmation by the President of the United States.

Instead what we find is that a small group of perhaps well-intentioned and zealous underlings have taken or been given control of this selection process, without regard to congressional wishes or statutory demand.

And if this were not bad enough, the District Courts, who have the ultimate and judicial responsibility for seeing that the statute is complied with, were misled by the Justice Department. Applications were placed before the District Courts that contained misstatements as to (1) who has undertaken the review and the selection process, and (2) whose signatures were really affixed to the documents upon which the government relied.

Finally, and inevitably, we see the tidying up process, in which the government, *post litem motam,* trying to explain away and justify as a technicality practices that

would bring down condemnation and perhaps worse consequences upon a private practitioner.

Because of the far-reaching consequences in the power it gives our government and because it is such a devastating incursion on the cherished right to privacy, the subject of wiretapping is an emotional one. Perhaps government employees should have the right to eavesdrop on their fellow citizens with court sanction. But when the District Court is first misled by government employees into sanctioning this eavesdropping and then told that the deception is no more than a technicality, the limits of government by law and not by person have been exceeded.

We respectfully submit that the reasoning and goals set forth in the following from *Chavez* should govern in the instant situation and find acceptance as the law of the land:

> "In sum, we hold that the identification requirements of Section 2518 (1)(a) and (4)(d) complement the authorization requirement of Section 2516(1). Without the former, the latter would be meaningless: it would be impossible to determine whether the Attorney General or one of his nine Assistant Attorneys General or someone else was actually responsible for the decision to authorize application for a wiretap. Despite the authority to the contrary, we refuse to interpret the authorization requirement strictly, * * * and to wave away the identification provisions as mere technicalities. To do so in this case would be to countenance an apparently deliberate deception of the courts by the highest law officers in the land. The Supreme Court, the Court of Appeals and the District Courts have traditionally relied upon the integrity of representations made to them by such officers. If we were to uphold what they did here, the door would be open to similar behavior in other cases, and the trust of the

courts in the Attorney General and his Assistant Attorneys General, so vital to the efficient and effective conduct of judicial business, would soon be destroyed." (Slip Opinion, pp. 8-9).

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1972 — JANUARY SESSION, 1973
Nos. 72-1514, 72-1637, 72-1729, 72-1799

UNITED STATES OF AMERICA, *Appellant,*

vs.

JACK ROBERTS, et al., *Appellees.*

CHARLES BISHOP SMITH, et al., *Appellees.*

JEROME LEAVITT and NORMAN SHABAS, *Appellees.*

UNITED STATES OF AMERICA, *Appellee,*

vs.

MICHAEL POSNER, *Appellant.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 CR 790 — RICHARD W. MCLAREN, *Judge.*
No. 71 CR 852 — FRANK J. MCGARR, *Judge.*
No. 71 CR 864 — THOMAS R. MCMILLEN, *Judge.*
No. 71 CR 290 — RICHARD B. AUSTIN, *Judge.*

ARGUED JANUARY 11, 1973 — DECIDED APRIL 3, 1973

Before SWYGERT, *Chief Judge,* KILEY and CUMMINGS, *Circuit Judges.*

PER CURIAM. These appeals involve the question whether motions to suppress the content of intercepted telephone communications should have been granted in these four cases. Numerous persons were indicted for conducting an illegal gambling business in violation of 18 U.S.C. § 1955 and making related interstate telephone calls in violation of 18 U.S.C. § 1952.[1] The defendants filed motions to suppress evidence obtained by court-ordered wire interception. In part, the motions challenged the procedure used by the Department of Justice in authorizing the submission of the applications for the wire interception orders to the court. In Nos. 72-1514, 72-1637, and 72-1729, the motions to suppress were granted, and the Government appeals therefrom pursuant to 18 U.S.C. §§ 3731 and 2518(10)(b).[2] In No. 72-1799 the district court denied the motion to suppress, whereupon the defendant Michael Posner entered a plea of guilty, specifically reserving, however, the right to appeal the denial of his motion to suppress. This reservation of his right to appeal on a non-jurisdictional ground was made on agreement with the prosecutor and with the acquiescence of the trial court, and defendant Posner is now appealing pursuant to the reservation.

The applicable statute, 18 U.S.C. § 2516(1), provides in pertinent part that "The Attorney General, or any Assistant Attorney General specifically designated by the Attorney General, may authorize an application to a Fed-

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[1] In No. 72-1799 the indictment was for a conspiracy to violate 18 U.S.C. § 1952.

[2] In No. 72-1637, the notice of appeal was filed within 30 days of the district court's denial of the Government's motion to reconsider. The notice of appeal was timely filed. See *United States* v. *Healy*, 376 U.S. 75, 77-80.

eral Judge" for an order authorizing the interception of oral or wire communications by the FBI in certain instances. In Nos. 72-1514 and 72-1637, Attorney General Mitchell did not authorize or designate an Assistant Attorney General to authorize these applications. The authorizations in question were made by Sol Lindenbaum, Executive Assistant to the Attorney General, who affixed the Attorney General's initials as per the latter's standing grant of authority to act when he was unavailable.[3] Mr. Lindenbaum concluded from his "knowledge of the Attorney General's actions on previous cases that he would approve the request if submitted to him." For the reasons persuasively stated by Judge Sobeloff in *United States* v. *Giordano*, 469 F.2d 522 (4th Cir. 1972), certiorari granted, 41 U.S. Law Week 3516,[4] we conclude that the statute empowered only the Attorney General—or a specially designated Assistant Attorney General—both of whom, in contradistinction to Mr. Lindenbaum, are subject to the political process of Senate confirmation—personally to authorize such applications.

When Mr. Lindenbaum initially authorized the applications, he affixed the Attorney General's initials to memoranda addressed to Assistant Attorney General Will Wil-

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[3] The internal Justice Department procedure followed here is set forth in *United States* v. *Pisacano*, 459 F.2d 259, 263 (2d Cir. 1972), and *United States* v. *Giordano*, 469 F.2d 522, 525-526 (4th Cir. 1972), certiorari granted, 41 U.S. Law Week 3516.

[4] See also *United States* v. *Robinson*, 468 F.2d 189 (5th Cir. 1972), remanded for an evidentiary hearing to determine whether the wiretap applications were properly authorized under 18 U.S.C. § 2616(1). ..... F.2d ..... (5th Cir. Jan. 16, 1973; *en banc*); *per contra*, see *United States* v. *Pisacano*, 459 F.2d 259 (2d Cir. 1972); *United States* v. *Becker*, 461 F.2d 230, 235-236 (2d Cir. 1972).

son stating that "[p]ursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise those powers for the purpose of authorizing David M. Quinn to make the above-described application." Mr. Wilson, however, did not personally authorize the application, but delegated to Deputy Assistant Attorneys General the authority to sign his name to letters of authorization for attorneys in the field. This is exactly what they did. Had the initial authorization actually been made by the Attorney General (or a specially designated Assistant Attorney General), we would agree with the Government that the purported "special designation" of Mr. Will Wilson was really not that contemplated by the statute (the Attorney General never exercised this statutory prerogative) but a delegation to perform a ministerial function, which the Assistant Attorney General could subdelegate.[5] Moreover, although the applications submitted to the trial judge identified Assistant Attorney General Will Wilson as the authorizing officer specially designated by the Attorney General, we would not be inclined to elevate form over substance to find a violation of 18 U.S.C. § 2518(1)(a) and (4)(d), requiring the identity of the authorizing officer be transmitted to the court if there had been an initially proper authorization.[6] However, the fact is simply that in Nos. 72-1514 and 72-1637 there was no proper authorization at all; neither the Attorney General nor any Assistant Attorney General specially designated by the former authorized the wiretap applications. Therefore, the Government's argument

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[5] *United States* v. *Casale*, 467 F.2d 647, 651 (3d Cir. 1972); *United States* v. *Cox*, 462 F.2d 1293, 1300 (8th Cir. 1972); *United States* v. *Becker*, 461 F.2d 230, 235 (2d Cir. 1972).

[6] See cases cited in note 5, *supra*.

against finding a violation are founded on a non-existent premise and are unavailing.

Finally, as in *Giordano, supra,* the Government argues that even if there were "technical errors in the procedure used," the "drastic remedy of suppression of evidence" is unwarranted. Were it ours to decide whether or not judicially to fashion a rule of exclusion in this circumstance, we might agree with the Government. However, 18 U.S.C. §§ 2515 and 2518(10)(a) are patently clear in expressing the Congressional judgment that these intercepted communications may not be received in evidence.[7]

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[7] 18 U.S.C. § 2515 provides:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

18 U.S.C. § 2518 (10)(a) provides in pertinent part:

"Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter."

United States v. *Giordano, supra* at 531. Therefore, motions to suppress were properly granted in Nos. 72-1 and 72-1637.

In No. 72-1729, the Attorney General personally proved the wiretap applications. However, Judge Millen held that the wiretap evidence as to Leavitt Shabas must be suppressed because the wiretaps were progeny of the illegal wiretaps involved in No. 72-16 We agree. 18 U.S.C. § 2515 provides that "no evidence rived" from any intercepted wire or oral communicat "may be received in evidence in any trial * * * if closure of that information would be in violation of chapter." Implementing that Section, 18 U.S.C. § 2 (10)(a) provides that any aggrieved person may m to suppress "evidence derived" from an unlawfully in cepted communication, and if the motion is granted contents of the wiretap "or evidence derived therefr shall be treated as having been obtained in violation this chapter." Taken together, these Sections requi Judge McMillen to grant the motions of Leavitt and Sha because the Government admitted that they were both o heard on the properly suppressed *Smith* wiretaps (in 72-1637) which prompted the wiretap applications in 72-1729. Once again, the basis for exclusion is the st tory mandate that evidence derived from an illegal w tap be suppressed and not a judicially fashioned ex sionary rule or "fruit of the poisonous tree" doct arrived at by balancing the respective interests invol While the statutory command may not be read to p

[8] We need not pass on the propriety of granting Shabas' motio the additional ground that he was not mentioned by name in e order authorizing the wiretaps. But see *United States* v. *Kahn*, F.2d ..... (7th Cir. 1972).

the scope of suppression beyond that existing under present search and seizure law, the statute embodies the decision to suppress unlawfully obtained interceptions and evidence derived therefrom. We think it no unusual extension of that scope of suppression under existing law to conclude that the wiretap evidence in No. 72-1729 was derived from the *Smith* wiretap.[9]

In No. 72-1799, involving Michael Posner, the last of the seven Detroit and Chicago wiretap orders was illegal because the interception authorization was signed by Mr. Lindenbaum instead of by the Attorney General or a specially designated Assistant Attorney General. The Government admits that some of the information supporting

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[9] *Smith* v. *United States*, 324 F.2d 879 (D.C. Cir. 1963), certiorari denied, 377 U.S. 954, on which the Government relies, is not analogous. There the court properly held that testimony of an eyewitness to a crime need not be suppressed because the police had learned his identity from defendants during their illegal detention. Here Leavitt's and Shabas' private communications were invaded by wiretaps which emanated from the earlier illegal ones, and the contents of these communications were sought to be used against them. As then Judge Burger pointed out in *Smith*, even though the source of the witness' identity was tainted, "[t]he fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence." *Id.* at 881-882 (footnotes omitted). However, overhearing Leavitt and Shabas on the unlawful wiretaps was not without evidentiary significance; indeed those interceptions gave rise to probable cause for the wiretaps order directly against those defendants. Moreover, the utterances of the defendants themselves cannot be equated with the testimony of an occurrence witness.

the first Chicago wiretap order application was obtained from the four Detroit court-authorized wiretaps. Three of those interception authorizations were signed by the Attorney General. The Government proved that the remaining one (dated April 3, 1970) was telephonically approved by the Attorney General; that satisfied Section 2516(1).[10] Therefore, only the evidence obtained from the final Chicago wiretap was subject to suppression. The district court must now decide if the evidence obtained from the six legal orders supported the guilty plea of Posner apart from evidence obtained through the illegal order of June 5, 1970. If so, his conviction will stand.

Orders in Nos. 72-1514, 72-1637, and 72-1729 affirmed. In No. 72-1799 the judgment is reversed and remanded for further proceedings consistent herewith.[11]

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

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[10] *United States* v. *Pisacano*, 459 F.2d 259, 263 (2d Cir. 1972).

[11] Since the constitutionality of Title III of the Omnibus Crime Control Act was not raised below as a ground for suppression, we decline to consider it. See *United States* v. *Wright*, 466 F.2d 1256, 1259 (2d Cir. 1972).

APPENDIX B

— Per curiam opinion —

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

April 3, 1973

Before

Hon. LUTHER M. SWYGERT, *Chief Judge.*
Hon. ROGER J. KILEY, *Circuit Judge.*
Hon. WALTER J. CUMMINGS, *Circuit Judge.*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 72-1799 vs.

MICHAEL POSNER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, VACATED and this cause be and the same is hereby REMANDED to the said District Court for further proceedings in accordance with the opinion of this Court filed this day.